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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 272.

NORWEGIAN NITROGEN PRODUCTS COMPANY, *Petitioner*,

v.

THE UNITED STATES.

On Writ of Certiorari to the United States Court of Customs and Patent Appeals.

MEMORANDUM FOR PETITIONER IN REPLY TO MEMORANDUM FOR THE UNITED STATES SUBMITTING REPORTS OF THE UNITED STATES TARIFF COMMISSION TOGETHER WITH LETTER FROM THE TARIFF COMMISSION AND THE SCHEDULES ANALYZING THE REPORTS.

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The Memorandum submitted by the United States of Reports by the United States Tariff Commission is in support of its contention that Departmental Practices of the Commission therein asserted are here pertinent as supporting an invoked rule of construction. It is supplemental to subdivision (v), page 28, of the brief of the United States. Since the Tariff Commission submits therewith an argument, some considerations anent the subject are here offered. The rule involved in Departmental Practice.

Departmental Practice is but one of many rules of construction which, even if shown applicable, may or may not be adopted by the Court in the presence of other considerations deemed controlling.

The applicable rule thereto relating is succinctly set forth in *Merritt v. Cameron*, 137 U. S., 542, 551, as follows:

> "A regulation of a department, however, *cannot repeal a statute;* neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction *has been continuously in force for a long time.* The cases cited go to that extent and no further. In regard to the law under consideration the construction of it by the Treasury Department *has not been uniform.* The construction contended for by defendants in error first arose in 1876 and lasted only until 1885, since which time the construction has been the same as in this decision. There is no such *long and uninterrupted acquiescence* in a regulation of a department, or departmental construction of a statute, as will bring the case within the rule announced at an early day in this court, and followed in many cases, to wit, that *in case of a doubtful and ambiguous law* the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, and should not be disregarded without the most cogent and persuasive reasons. *Edwards v. Darby,* 12 Wheat., 206; *United States v. Hill,* 120 U. S. 169, 182; *Robertson v. Downing,* 127 U. S. 607; *and many other cases.*" (Italics ours.)

"It is resorted to only in doubt." *United States v. Tanner,* 147 U. S., 661.

The philosophy of the rule is that where rights of property have been acquired under a ruling of a governmental department these should not be lightly interferred with nor divested by a contrary ruling. This philosophy does not extend to remedies.

The statute which it is sought to in effect repeal by the alleged practice of the Commission is subdivision (c) of Section 315 of the Tariff Act of 1922, reading:

> "(c) * * * Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its *hearings* and shall give reasonable opportunity to parties interested *to be present, to produce evidence, and to be heard.* The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary." (Italics ours.) (Petitioner's brief, p. 2.)

The rules promulgated thereunder and in effect at the time of this hearing and until November 25, 1930, read:

> "The Commissioner or Investigator in charge of any investigation shall review *all the evidence,* oral and written, and *all other information gathered in such investigation* by the Commission, and shall summarize the same and prepare for the Commission *in writing a report.*
>
> "Parties who have entered appearances shall, *prior to the filing of briefs,* have opportunity to examine *the report of the commissioner or investigator* in charge of the investigation *and also the record* except such portions as relate to *trade secrets and processes.*" (R. 66.)
>
> "Briefs may be filed at the conclusion of the testimony in each investigation. The commissioner or investigator in charge of the investigation shall fix a time within which briefs shall be filed and notice thereof shall be given by registered mail to all parties of record.
>
> Final Hearings and Findings.
>
> "*Final hearings* shall be before the Commission. Parties who have previously entered appearances may

> file briefs and upon permission being granted by the Commission present oral arguments. The findings of the Commission and of the members thereof shall be in writing and shall be transmitted, *together with the record,* certified by the Secretary under the seal of the Commission to the President for his action under the law." (R. 67.)

These rules have the effect of law. Not only do the submitted Practices fail to meet the aforesaid legal requirements but in substance they confirm Petitioner's claims that in the particular case the Commission not only failed to follow the law and its own regulations, but departed from its *usual* procedure and practice, denying Petitioner any semblance of benefit thereof.

The following general principles, it is respectfully submitted, render inapplicable, upon one or the other of the following grounds, all of the said submitted matter:

(a) The Practices and procedure of the Tariff Commission under the Act of 1916 and prior to the enactment of the flexible tariff, with the therein-provided "hearings," have been declared by this Court inapplicable to proceedings under the flexible tariff. This Court has so held *upon substantially this record,* presented to the Court in the earlier case, *Norwegian Nitrogen Products Company v. The United States Tariff Commission,* 274 U. S., 106. This Court therein, at page 111, ruled:

> "* * * Section 703 of the Revenue Act of September 8, 1916, under which the Commission was created, requires it to make certain specified studies of the administration and operation of the tariff laws of the United States and tariff relations of the United States with foreign countries, on request to the President and certain Committees of the two houses of Congress. ***That Act has no relevancy here since, unlike the Act of 1922, it contains no provisions for hearings in conjunction with the investigations there authorized.***" (Italics ours.)

(b) The Practice contended for by the Government, if at all relevant, would in effect repeal the foregoing statute and violate the usual procedure of the Commission prescribed in the aforesaid rules as a part of the law.

(c) There has been no long-continued practice effective in this case. Certainly, as held aforesaid, the practice of the Commission under a different statute before the enactment of the flexible tariff have no relevancy here. That brings the matter up to September 22, 1922, the date of the enactment of the flexible tariff. The rules of the Commission applicable at the time this case arose and was concluded were promulgated during October, 1922. The application of the American Nitrogen Products Company, the subject of this controversy, was filed with the Commission during the month of October, 1922. The hearings wherein it is asserted the Commission denied Petitioner its rights and exercised legal powers and authorities not warranted by law, were had during the months of September and October, 1923.

The departmental practice or procedure, therefore, applicable to this case, authorizing and supporting the particular rulings of the Commission made herein denying Petitioner's requests, must have been that in existence, uniform and long-established, *at the time of the making of said rulings,* to wit, at or before October, 1923. Certainly, Petitioner's rights fixed by statute and regulations in force at the hearings of September and October, 1923, cannot be legally destroyed by a Practice which must be uniform, long-established and in question and which was admittedly not had until and during *years thereafter,* if at all.

Certainly the limited time of one year between the enactment of the flexible tariff and the conclusion of the rulings complained of, less than one year, is not such under any decision as would justify the Court in adopting the same as a Departmental Practice sufficiently long established to repeal a statute or to become an established rule of con-

struction. Certainly it will not be held that one of the parties to a controversy can, *subsequent to said controversy,* so conduct itself as to establish by practice a rule of construction supporting its acts long before done plainly unwarranted by exprsss statute and contrary to the rules at the time of said hearings and many years thereafter in full force and effect.

(d) The Practice asserted to justify the rulings complained of in this case has been contested since the time said rulings have been made and is now being contested. This record so shows, not only by this but other court proceedings herein adverted to by the United States. These alleged Practices, therefore, cannot be said to be within the doctrine of this Court set forth in *Merritt v. Cameron, supra,* to have been "long," of "uninterrupted acquiescence" or "uniform".

(e) The alleged Practices of the Commission were during all the time of their alleged continuance inhibited by the statute and established rules of the Commission. They could not repeal that statute nor revoke said rules.

The limited time allowed for answer to said Memorandum will not permit detail analysis. Indeed, such would not seem necessary by reason of the manifest inapplicability thereof to the issues of the case.

The question here presented is whether or not parties appearing at the publicly noticed Hearings of the Commission, *when proceeding under the flexible tariff,* are entitled to question applicants as to the *costs* of production alleged in their complaint, be furnished with a *complete* copy thereof, and inspect such cost data as has been gathered by the Commission's investigators under said statute and rules in order to exercise the statutory rights of such interested parties appearing "to produce evidence *and* to be heard."

Neither the Memorandum produced nor the argument of the Commission thereto-annexed is shown to contain cost data demanded, furnished or denied *in a contested pro-*

ceeding under the flexible tariff, but includes solely certain Reports of the Commission to the President or its Annual Reports made long after "hearings" were concluded by the Commission and not under any statutory or regulative control or command.

Said Memorandum divides cost data, the subject of its said reports, into three classes:

(a) Reports in which cost data are shown by companies identified only by a number or symbol.

(b) Reports in which costs are shown only as averages.

(c) No cost data, or merely cost differences or domestic and foreign costs expressed as percentages of each other.

These several classifications prove a lack of uniformity in the Practices of the Commission were they here relevant.

Numerous detail explanations follow each. These include such "costs not published because publication would reveal operations of manufacturers and disclose *confidential* information *contrary to the provisions of Sec. 708, Revenue Act of 1916*". That section not only does not here apply, but does not prohibit the publication of "*confidential* information". It prohibits only *investigators* of the Commission giving out "*trade secrets*". It does not apply to the Commission when as such holding "Hearings".

There is not any law that prohibits "the Commission" at any time disclosing "confidential information" or "operations" of "individual companies" during its "hearings". That doctrine as held by this Court is correctly synopsized in the syllabus of *St. Louis Railway Co. v. Interstate Commerce Commission,* 264 U. S., 64, as follows:

> "This claim of the carrier should not be denied upon the ground of public policy, *nor upon the ground that the evidence was given the Commission in confidence.*"

While as a matter of policy the Commission's procedure in all such reports as shown may be commendable, it has no relevancy in such cases as this, wherein an applicant is seeking to cripple competition or drive competitors out of our markets by invoking a procedure based on the alleged difference in his and their costs of production. In such cases, common justice demands that the complainant should disclose and prove his costs, subject to scrutiny and cross-examination. See Petitioner's brief, pages 5 and 6. The statutory "hearings" so imply. Petitioner's brief, pages 34 to 41, inclusive.

Even were these Reports of the Commission here relevant, they and the three classes of cost forms therein enumerated show that even when not so required by statute and its rules, it is the practice of the Commission to in some way or form, as by number or symbol, or by averages, or some form of relative costs, publish costs of production. Indeed, that of casein, set forth as Exhibit A at page 12 of Petitioner's brief, like numerous others in the Government's Memorandum, demonstrates the fallacy of the Government's contention.

The arbitrary, unfair and illegal rejection of Petitioner's demands herein is shown by the item under (c) of the Government's memorandum, to wit: "Sodium nitrite * * * no costs disclosed, because costs were obtained from only two domestic companies." That is this case. The Memorandum refers to the Report to the President (R. 195, Exhibit 16) made long after the hearings had closed. That is not here material. Neither is any of the long lists of "Reports to the President" submitted in the Memorandum herein by the Government. These are all submitted long after hearings were closed and not under any statutory or regulative control.

The cost data refused Petitioner herein by the Commission are the cost data contained in the Complaint without deletion (R. 160, Exhibit 8) and in the "SUMMARY" sub-

mitted (R. 164, 165) *at the hearing* upon demand of Petitioner for information as to the alleged costs it had to meet as an opposing interested party appearing.

(a) While the Commission states no costs were submitted in the *Report to the President* because there were but two domestic producers, it *did* submit in the Summary the estimated costs *in detail of the single producer in Norway.* (R. 172.)

(b) It refused to submit any domestic costs, though the record shows such in the possession of the Commission because claimed "trade secrets" (R. 171) and that therefore the Commission was inhibited by Sec. 708 of the Revenue Act of 1916 from publishing such alleged trade secrets although *public records!*

(c) Nor did nor does the Commission promise to keep confidential the information it receives. Its own statement in court so shows. It only promises not to publish the same *in a manner that will disclose individual costs.* See Petitioner's brief, page 66.

(d) Though it appears from the Summary (R. 164) that the Commission had domestic costs in its possession, as part of the complaint and as gathered by its investigators, inspection of which was duly demanded by Petitioner (R. 147-149), it refused to permit Petitioner to inspect the same, and at no time or place, or in any Summary or Report, or otherwise, did it permit Petitioner the slightest knowledge or inspection thereof either as costs of production of individual factories or averages thereof, or by percentage expression, or as a measure of differences in costs, foreign and domestic or otherwise. Petition was denied all and every such information, contrary to the Commission's own rules, contrary to law, and contrary to what it now exhibits

to this Court as its practice to publish in numerous other cases.

Respectfully submitted,

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